The panel's ruling, *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, (C.A. 9 (Or.)), in relevant part holds:

> Because it is content-neutral, the Act need not contain the procedural safeguards required of content-based regulations. The Act need not include either a deadline for consideration by the governing body or a provision for prompt judicial review. *See Thomas*, 534 U.S. at 322-23.
>
> * * *
>
> We acknowledge the theoretical possibility that, without a deadline, Jackson County could effectively shut down gatherings by delaying permit decisions indefinitely. *See Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); *Bo Fancy Prods., Inc. v. Rabun County Bd. of Comm'rs*, 267 Ga. 341, 478 S.E.2d 373, 375-77 (Ga. 1996). The uncertainty of knowing when, if ever, the local governing body will act on the permit application may hamstring the arrangements for such large events, which must be made far in advance. In fact, in this case, the uncertainty inherent in the 1996 application process was one of the Fair's primary reasons for bringing suit.
>
> In discussing why the content-neutral ordinance in *Thomas* adequately limited the discretion of the decision-maker, the Court observed that the ordinance required the municipality to process applications within 28 days. 534 U.S. at 324.

> But the Court did not indicate that the deadline was an essential component of a reasonable time, place, and manner regulation. *To read the opinion that way would flatly contradict the decision's clear holding that time, place, and manner regulations need not contain the Freedman safeguards. Thomas, 534 U.S. at 322-23. Despite the Court's reference to the 28-day deadline, therefore, we conclude that the procedural safeguards doctrine is relevant only to explicit censorship schemes, not to content-neutral schemes.* (at 1138. Emphasis added.)

The panel's analysis functionally provides greater protection for statutes permitting one kind of speech and not others. A licensing authority must act within a reasonable time if operating under a permit system for adult bookstores or erotic parlors, but may languish indefinitely if operating under a generalized system of permitting gatherings of political expression. Such an interpretation would seem implausible, as it allows a content-based form of discretion for political expression but not for sexual expression. Petitioner concurs with the First Circuit, *New England Reg. Council of Carpenters v. Kinton*, 284 F.3d 9, 25 (n.8) (1st Cir. 2002) — the licensing authority's ability to deny a permit by dragging their feet is still repugnant and unconstitutional in light of *Thomas*.

Moreover, this Court in *Thomas*, emphasized the 28 day requirement to process an application as being a necessary component in finding the *Chicago Ordinance* sufficiently constitutional:

> Moreover, the Park District must process applications within 28 days, § C.5.c, and must

> clearly explain its reasons for any denial, § C.5.e. These grounds are reasonably specific and objective, and do not leave the decision "to the whim of the administrator." *Forsyth County*, 505 U.S., at 133, 112 S. Ct. 2395. They provide "'narrowly drawn, reasonable and definite standards'" to guide the licensor's determination, ibid. (quoting *Niemotko*, *supra*, at 271, 71 S. Ct. 325). And they are enforceable on review—first by appeal to the General Superintendent of the Park District, see Chicago Park Dist. Code, ch. VII, § C.6.a, and then by writ of common-law certiorari in the Illinois courts * * * .(at 325)

It is noteworthy that in this case before the panel, Barter Fair first attempted to apply for a Permit in January, for a large three-day event in October, and was first delayed until April 1, and then not ruled upon until late August. This delay caused the very logistical problems cited by the Panel—delay in preparation of fields, confirmation with vendors, and uncertainty of attendees.

Petitioner agrees with the perception of the Ninth Circuit En Banc's Dissent writer, indicating at the core of the problem is the three judge panel's confusion between the requirement for prompt judicial review and for prompt administrative review. It is axiomatic that a licensing agency can effectively deny an application at random by simply delaying a determination. Such unbridled discretion can only lead to the suppression of speech based upon a disagreement with that speech.

There has been a recent United States Supreme Court decision directly pointing to a result different from that achieved by the panel—*City of Littleton, Colo. v. Z.J. Gifts*

D-4, L.L.C., 124 S. Ct. 2219 (2004). The Tenth Circuit Court's analysis of a permitting process which allowed extensive indeterminate delays was cured prior to The Supreme Court receiving the case. "[The Tenth Circuit] also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay—a problem that the city believes it has cured by amending the ordinance." (at 2222.) The Court did go forward and restate the importance of the safeguard of prompt administrative review: "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two [Freedman] safeguards are essential. . . ." (at 2224.) Although the business at issue was specifically addressed by the statute being analyzed—an adult book store—the Court was stating what it presumed all courts know about the importance of prompt administrative action, in contrast to prompt judicial review. ("We presume that courts are aware of the constitutional need to avoid undue delay result[ing] in the unconstitutional suppression of protected speech.") (At 2225. Internal quotation omitted.)

2. CONFLICT WITH OTHER CIRCUITS

The decision of the Panel appears to conflict with other interpretations of the *Thomas* decision within the Ninth Circuit:

> *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092,1108 (9th Cir. 2003) (Although the highly exacting standards of *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), are not required for a

> content-neutral permit scheme like the present one, limits on the discretion of the licensor are necessary to prevent viewpoint or content discrimination. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-23, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002). Such limits must provide "'narrowly drawn, reasonable and definite standards'" that are "reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" *Id.* at 781.");

THG Enterprises Inc. v. City of El Cajon, 60 Fed. Appx. 711,712 (9th Cir, 2003).

> We also affirm the district court's decision that the City's Municipal Code § 17.66.020(F)(5) is an unconstitutional prior restraint on speech. Even if we assume the ordinance is content neutral, it does not provide adequate procedural safeguards governing when, where, or how a permit is granted. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

Lombardo v. Warner, 353 F.3d 774,787 (9th Cir. 2003) (*See also Thomas*, 534 U.S. at 323, 122 S. Ct. 775. ("[E]ven content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. . . . We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."). Absent objective, judicially-enforceable standards, it will never be possible to ensure that content or viewpoint was not taken into account * * *.")

Petitioner herein adopts the En Banc's dissenting opinion, 1128-29, on the subject of other Circuits:

> In this instance, some of the cases in the other circuits that consider seemingly similar questions rely on considerations not here applicable. To the extent others of those cases, like the panel in this case, read Thomas as having held that there is no longer any need for clear timeliness standards for the consideration of content-neutral permits affecting speech activities, those cases are wrong, and we should not follow them.
>
> The First Circuit's decision in *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002), for example, involves circumstances sufficiently different from those in this case that there would be no conflict were we to hold the OMGA facially invalid for failure to specify any time limit for consideration of permit applications. In *New England Regional Council*, the First Circuit considered a leafletting permit scheme under which "the automatic issuance of permits negate[d] [the] potential concern . . . that officials could effectively deny permits by dragging their feet." *Id.* at 25 n.8. More importantly, the plaintiff's as-applied challenge did not specifically attack the lack of an administrative review deadline.
>
> The Tenth Circuit, in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), erred as the panel did—by reading Thomas as holding that permitting

ordinances need not contain time limits when in fact *Thomas* did not so state. *See id.* at 1259. In the course of so ruling, Utah Animal Rights Coalition suggested that there is no need for time limits in content-neutral permitting ordinances, as they do not restrain speech during the period of any delay. This analysis entirely misses the reason given in Thomas for requiring "[n]arrowly drawn, reasonable and definite standards," *id.* at 324, 122 S. Ct. 775—to constrain administrative discretion that can serve as a cover for content-based distinctions and result in preventing speech for lack of adequate advance notice. Moreover, the analysis turned in part on the plaintiff's failure in that case to argue that the lack of a deadline for administrative review violated *Thomas*'s second holding. *Id.* at 1260. The plaintiff apparently argued that an administrative review deadline was required under only *Freedman v. Maryland*, not *Thomas*, as it suffered from "confusion on this point of law." *Id.* at 1259. Finally, as in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *cert. denied*, __ U.S. __, 124 S. Ct. 2816, 159 L. Ed. 2d 247 (2004), and *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), *Utah Animal Rights Coalition* disregarded *Thomas*'s review of the Chicago Park District permitting ordinance, failing to note that there was an administrative review deadline and that the Court considered that deadline in concluding that

the standards in the permitting ordinance were sufficiently specific to survive a facial challenge. [FN4]

FN4. Granite State Outdoor Advertising is particularly worrisome, as the court explicitly decided to await evidence of a pattern of abuse before deciding that the challenged ordinance without a time limit for administrative review was constitutionally inadequate. 348 F.3d at 1282.

CONCLUSION

The Ninth Circuit panel incorrectly interpreted the holding in *Thomas* as it relates to the need for prompt administrative review. The panel failed to distinguish between this court's analysis of prompt judicial review and prompt administrative review. The likelihood of other such misconstruction is high. Whether or not there is emerging an identifiable conflict among the circuits, this Court need grant this writ to prevent further misapprehension of this Court's salient and binding Ruling.

Respectfully submitted,

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